



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Commission Secretary's Office *seg*

DATE: December 5, 2012

SUBJECT: Comment on Drafts A and B of AO 2012-37
(Yamaha Motor Corporation, USA)

**Attached is a timely submitted comment from Bryan P. Tyson,
Counsel for Yamaha Motor Corporation, USA.**

Attachment



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December 5, 2012

**VIA FAX to Commission
Secretary at 202-208-3333
Federal Election Commission
Office of the General Counsel
999 E Street, NW
Washington, DC 20463**

Re: *Comment on Drafts A and B of Advisory Opinion Request 2012-37 by Yamaha Motor Corporation, USA*

Dear Mr. Herman:

Requestor Yamaha Motor Corporation, USA ("Yamaha") supports the Commission's Draft B in response to Advisory Opinion 2012-37 and opposes Draft A. Both drafts were issued on December 3, 2012.

As explained in Draft B, the affiliation between Yamaha and its dealers and service centers is far more than the typical business contract between two entities. The Commission should adopt Draft B because the level of control exercised by Yamaha over its dealers and service centers extends far beyond what would typically take place in an agreement to sell products. In addition, the governance of Yamaha over its dealers and service centers should carry more weight in judging affiliation than the lack of exclusivity in the agreements.

1. Yamaha Exercises Significant Control Over Its Dealers and Service Centers.

Yamaha exercises extensive control over the governance of its dealers and service centers. The Dealer Agreement and the Service Center Agreement provides that Yamaha must give permission before the entity can change its business location.¹ Yamaha also exercises wide-ranging authority over the management personnel of its dealers and service centers, requiring advance approval of Yamaha for any change in ownership or management.² This is consistent with the type of advance approval and control which demonstrated affiliation in Advisory Opinion 1979-38 (Hardee's).

The advance approval Yamaha requires of its dealers and service centers is in sharp contrast to relationship of Anheuser-Busch to its wholesalers in Advisory Opinion 1985-07, which only required discussion of a prospective sale. Anheuser-Busch also had "limited rights" to "approve the wholesaler's

¹ Dealer Agreement, Section 1.3; Service Center Agreement, Section 1.2.

² Dealer Agreement, Section 7.1, 7.2; Service Center Agreement Section 6.1.

Federal Election Commission
December 5, 2012
Page 2 of 3

designation of a Successor-Manager," but Yamaha's agreements and relationship give it broad veto power over such decisions. There is no indication that Anheuser-Busch had the authority to prevent changes of ownership as Yamaha does in its agreements.

Unlike the limited financial reporting information submitted to Anheuser-Busch in Advisory Opinion 1985-07, Yamaha does not have limits on the financial information required of dealers. It requires dealers to submit their entire audited financial statement for the previous year and does not only receive reports about the sale and service of Yamaha products.³ Dealers and service centers must also make reports available for inspection and audit by Yamaha regarding their activities, the same requirement that existed for H&R Block franchisees in Advisory Opinion 1992-07.⁴

Like the standards outlined in Advisory Opinion 2012-12 (Dunkin' Brands), Yamaha exercises control over "the manner in which dealers and service centers train their personnel; display their products; maintain their inventory; and deal with their customers; as well as their hours of operation and the location, size, and layout of their buildings, showrooms, offices, parts departments, and service operations. Dealers and service centers also are required to provide service to any person who has purchased a Yamaha product, regardless of where that product was purchased, and to purchase tools and equipment prescribed by Yamaha to service Yamaha products."⁵ Also like Dunkin' Brands, Yamaha regulates the advertising process for its dealers and service centers and only grants the authority to use its trademarks in a manner specified by Yamaha and subject to its complete control.⁶

The amount of control surrendered by the dealers and service centers to Yamaha in exchange for becoming a dealer or service center is far more than a "typical business contract between two independent and separate entities."⁷ In contrast, the dealer or service center becomes sufficiently connected to Yamaha that it loses a significant degree of independence in the process while Yamaha exercises "pervasive supervision and direction"⁸ over the dealer or service center.

2. Exclusivity Should Not Be the Primary Test for Affiliation.

Draft A would essentially close the door on any business relationship but an exclusive one for purposes of solicitations for a separate segregated fund. Draft A focuses this lack of an exclusive relationship as a basis for finding Yamaha and its dealers and service centers are unaffiliated.

But the requirements of 11 C.F.R. § 100.5(g)(4) that the Commission reviews for affiliation are primarily about governance, not sales. In Advisory Opinion 1985-07 (Anheuser-Busch), the Commission looked primarily to the lack of governance and control Anheuser-Busch had over its wholesalers, while finding the lack of exclusivity was "further evidence" beyond the governance issues. Similarly, in Advisory Opinion 1988-46 (Collins), the Commission focused on the governance and

³ Dealer Agreement, Section 5.5.

⁴ Dealer Agreement, Section 2.8; Service Center Agreement, Section 4.5.

⁵ Draft B, p. 9 (footnotes removed).

⁶ Dealer Agreement, Section 5.4; Service Center Agreement, Section 4.2.

⁷ Advisory Opinion 1985-07 (Anheuser-Busch).

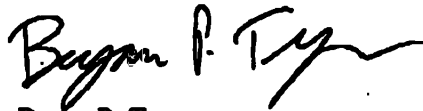
⁸ Advisory Opinion 1985-07 (Anheuser-Busch).

**Federal Election Commission
December 5, 2012
Page 3 of 3**

control exercised by the licensor over the licensee. The regulatory focus on governance first, as opposed to exclusivity, makes sense as a matter of policy because the amount of management control exercised by a company over its licensees creates an affiliation beyond a typical business relationship. Draft A improperly shifts the Commission's focus from governance to exclusivity and may close the door on finding affiliation in two companies with a non-exclusive business relationship.

For all the reasons outlined in the original request and in this comment letter, Yamaha urges the Commission to issue Draft B in response to Advisory Opinion Request 2012-37.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bryan P. Tyson", with a stylized flourish at the end.

Bryan P. Tyson
Counsel for Yamaha Motor Corporation, USA

cc: Office of General Counsel via fax to 202-219-3923